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# LEGAL LOG

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## Breathless:

Implied consent, blood samples and presumptions after State v. Carrigan

From time to time the law enforcement community reaches a point at which it becomes familiar and comfortable with a tool which it has found to be especially effective in the presentation of the prosecution case. On occasion, however, this comfort and familiarity may be shaken by a court's ruling that the tool is being incorrectly applied. When this happens steps must be taken to insure that, if worthwhile, the tool is once again put to proper use. If not, its usage should be stopped.

The tool in this instance is the South Carolina Implied Consent statute, section 56-5-2950 of the South Carolina Code. The ruling is the South Carolina Court of Appeals opinion in State v. Carrigan, dated March 12, 1985 (Opinion Number 0415).

Although the court's opinion in Carrigan examines several issues, perhaps the most important to street officers is the discussion of section 56-5-2950, the South Carolina Implied Consent statute, and the method by which a defendant's intoxication, for purposes of the DUI statute (56-5-2930), may be proved.

The facts in Carrigan were basically as follows:

Carrigan, his wife and his wife's cousin were involved in a one car accident in which Carrigan was the driver. Carrigan's wife was killed and Carrigan and the cousin were injured. The South Carolina Highway Patrol Trooper who investigated the acci-

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dent later testified at trial that Carrigan was "highly intoxicated." Further evidence at the trial showed that Carrigan had been taken to a nearby hospital for treatment of his injuries received in the accident. A technician from the hospital to which Carrigan had been taken testified that a blood sample drawn from him was tested, revealing a blood/alcohol content of "164 milligrams per deciliter". The technician confirmed "that the reading is the same as point one-six-four (.164) of a breathalyzer test."



Based on the above facts and evidence, Carrigan was convicted of DUI and Reckless Homicide.

In proving Carrigan's guilt the State relied upon the South Carolina Implied Consent statute. The statute, which is entitled "Implied consent to chemical test to determine alcoholic content of blood...", provides, in part, in subsection (a):

"The test shall be administered at the direction of a law enforcement officer who has apprehended a person while driving a motor vehicle upon the public highways of this State while under the influence of intoxicating liquor. The test shall be administered by a person trained and certified by the South Carolina Law Enforcement Division, using methods approved by the South Carolina Law Enforcement Division."

Subsection (b) provides, in part:

"In any criminal prosecution for the violation of section 56-5-2930 relating to driving a vehicle under the influence of intoxicating liquor, the amount of alcohol in the defendant's blood at the time of the alleged violation, as shown by chemical analysis of the defendant's breath, shall give rise to the following presumptions." (Emphasis added.)

Subsection (b) then goes on to provide for presumptions based on the alcohol found in a defendant's blood, among which is the presumption that if there was ten one-hundredths of one percent (.10%) or more by weight of alcohol in a defendant's blood, it shall be presumed that the defendant was under the influence of intoxicating liquor.

On appeal from the convictions Carrigan raised, among other issues, three very important arguments concerning the Implied Consent statute:

First, as indicated above, subsection (a) requires that the chemical test be administered "at the direction of a law enforcement officer who has apprehended a person..." who was driving while under the influence.

Second, subsection (a) requires that the "...test shall be administered by a person trained and certified by the South Carolina Law Enforcement Division..."

Third, as indicated above, subsection (b) allows the presumption that a defendant was under the influence of intoxicating liquor if there was ten one-hundredths of one percent (.10%) of alcohol in the defendant's blood based upon a "...chemical analysis of the defendant's breath..." (emphasis added).

In all three arguments the Court of Appeals agreed with Carrigan. The court noted that there was no evidence to indicate that the arresting officer had requested the test; that the technician who performed the test was trained and certified by SLED or that, most basic of all, the test was one of Carrigan's breath, as required by the statute.

Although the Court noted that a blood test could be used to convict a defendant of DUI, it could not raise the same presumption which a breath test could raise by statute. Further, the court noted, use of a blood test would require testimony from an expert interpreting it.

For the foregoing reasons the Court of Appeals reversed Carrigan's convictions for DUI and Reckless Homicide and returned his case to the Court of General Sessions for a new trial on the charges.

The lesson to be learned from Carrigan is that, although the Implied Consent statute is a very useful tool for law enforcement in the proof of DUI cases, it should be used appropriately. Specifically, the presumption of intoxication created by subsection (b) of the statute applies only to a "chemical analysis of the defendant's breath" not to a blood test. As well, the "analysis of the defendant's breath," which will mean a "Breathalyzer" test, must be at the request of an officer who apprehended the defendant while driving on a public highway and must be performed by a person trained and certified by SLED. A blood test does not meet the above requirements and to have its results admitted, must be qualified by expert testimony: a much more difficult task.

LEGAL LOG is published monthly by the South Carolina Criminal Justice Academy, John A. O'Leary, executive director. The academy's legal affairs and legal instruction are handled by James M. Kirby, senior staff counsel, Henry R. Wengrow, general counsel, William C. Smith, staff counsel, and attorneys Everett N. Brandon and J.C. Coleman.